IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

ORDER

S.B.Civil Writ Petition NO.123/2005

Ram Niwas **vs** **State of Rajasthan & Anr.**

UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA

DATE OF ORDER : 17.1.2005

PPRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr. Bharat Devasi, for the petitioner.

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REPORTABLE

BY THE COURT

Heard learned counsel for the petitioner.

According to learned counsel for the petitioner, the petitioner married with one Sharda Devi on 16th May, 1987 as per Hindu Rites. Out of this wedlock, a daughter Seema born to the petitioner. The petitioner's wife Sharda Devi died on 11th May, 1993. The petitioner, thereafter, married to one Indra on 13th May, 1994. Out of this wedlock, two sons born to the petitioner. Smt. Indra died on 16th Oct., 1997.

Therefore, by two marriages, the petitioner got three children. It is submitted by learned counsel for the petitioner that after the death of second wife of the petitioner, the petitioner contacted third marriage, but there is no child from that wedlock.

According to learned counsel for the petitioner as per sub-clause (l) of Section 19 of the Rajasthan Panchayati Raj Act, 1994 (hereinafter referred as the Act of 1994), a person, who has more than two children and with a birth of any child after 27th Nov., 1995 is a disqualified person to contest the election for any of the posts of the Panchayat as provided under the Act of 1994. Therefore, petitioner may be declared disqualified on the ground that the petitioner has more than two children and one of the children of the petitioner was born after cut out date i.e., 27.11.1995 though the petitioner has no child from his present (third) wife and even from his earlier wives petitioner never had more than two children.

From facts it appears that, one child was born to the petitioner's earlier wife much prior to 27th Nov., 1995. The petitioner married with another lady and from that lady, the petitioner has two children and one out of two one born after cut out date (27.11.1995). According to petitioner, the petitioner cannot be held disqualified to contest the election because of the reason that petitioner has two children from one

wife two children from second wife. According to learned counsel for the petitioner, in view of the explanation appended to Section 19 of the Act of 1994, the number of children of a couple (**existing couple**) alone can be taken into account for counting the total number of children of prospective candidate. Since the petitioner has no issue from his present wife, therefore, the petitioner is not disqualified under clause of (l) of Section 19 of the Act of 1994. It is also submitted that in case where the law permits more than one marriages (in the case of Hindu, he may marry another lady after divorce to his wife or after death of earlier wife and Muslim may have four wives), then having more than two children from different wife or wives, cannot be a disqualification under sub-clause (l) of Section 19 of the Act of 1994. Learned counsel for the petitioner relied upon the judgment of this court delivered in S.B.Civil Writ Petition No.1105/1999-Praga Ram Vs. Civil Judge (Sr.Div.), Jalore & Ors. decided on 16.11.1999 wherein this very controversy was involved and this court after interpreting the explanation appended to Section 19 of the Act of 1994 observed as under:

> "Explanation,- For the purpose of clause (1) of Sec.19, where the couple has only one child from the earlier delivery or deliveries on the date of commencement of this Act and thereafter, any number of children born out of single subsequent delivery shall be deemed to be one entity.

From the above explanation, it is clear that the child

> will go with the couple and couple means to existing husband and wife and not the husband and his deceased first wife. The explanation has to be introduced by the Legislature under Section 19 of the Act because for no fault of the second wife, she (second wife) should not be made to suffer by denying her the fundamental right to have children. A person can only incur discrimination when the couple, i.e., present wife has more than two children otherwise he could not be disqualified."

Learned counsel for the petitioner submits that the word 'couple' has been used in the explanation appended to Section 19 and it cannot be made ineffective or cannot be rendered as dead letter because of the simple reason that no word in the provision can be rendered ineffective or purposeless as held by the this court in the case of Laxman Das Vs. Deoji Mal & Ors. reported in 2000(4) WLC (Raj.) 297, after considering several earlier judgments of the Hon'ble Supreme Court and earlier judgment of this court delivered in the case of Bhiva Ram & Ors. Vs. State of Rajasthan & Ors reported in 2000(3) WLC (Raj.) 645. it is also submitted that when words are clear in the statute then the meaning of the word as closed naturally to be taken into consideration while interpreting the provision of law. For this, learned counsel for the petitioner relied upon the judgment of this court delivered in the case of Naresh Kumar Rajput & 16 others Vs. State of

Rajasthan & Anr. reported in 1998(2) WLC (Raj.) 53. It is also submitted that explanation appended to main provision is also part of the statute as held by the Division Bench of this court in the case delivered in M/s.Shree Cement Ltd. VS. The Union of India reported in 2002(4) WLC (Raj.) 5. The Division Bench in the said judgment (M/s.Shree Cement Ltd.) (supra) held that explanation is part and parcel of section added to include in or exclude form ambit of main enactment with a view to clear some ambiguity in main portion but cannot be construed to widen ambit of provision. The petitioner further claimed that the law should be interpreted in favour of citizen and petitioner being citizen has right to contest the election in democratic process for the post under the provisions of the Rajasthan Panchayat Raj Act. Therefore, the interpretation, which favours the petitioner, is to be accepted. Learned counsel for the petitioner also relied upon the judgment delivered in Municipal Council, Pali Vs. Bahadur Raj Mehta reported in 2000(4) WLC (Raj.) 149, which says that interpretation of statute favouring the citizen, is just and proper.

Learned counsel for the petitioner further submitted that this court has, following earlier Division Bench decision of this court, taken a view in the case of Rajendra Kumar vs. State of Rajasthan (S.B.Civil writ petition NO.223/2004-decided on 21.12.2004- By Me), that a child given in adoption cannot be considered as child of that person, who gave his

child in adoption to other person. Therefore, in view of the above when law permits petitioner to marry after death of his first wife then only children of the wife in existence can be taken into account and not the children born from earlier wife.

I considered the submissions of learned counsel for the petitioner and perused the facts of the case.

It appears that the learned counsel for the petitioner proceeded on assumption that this court is proposing to read something in the explanation, which has not been included in the explanation or this court is proposing to ignore the word 'couple' mentioned in the explanation appended to Section 19 of the Act, of 1994 or intending to refer the letter 'couple' as of dead letter or superfluous or useless lumber. The apprehension of petitioner has no real basis. This court feels that the word 'couple' has been used purposefully and rightly.

The word 'couple' has been used in the explanation very aptly as the explanation deals with questions of multiple birth in single delivery. A single delivery can be of one couple consisting of the same male and female. The explanation very clearly provides that in case there will be birth of more children then one child in single delivery and by that number of children exceeds the limit as provided under clause (l) of

Section 19 then that will not be disqualification of the candidate. Meaning thereby, the Explanation deals with the case of birth of more than one children in single delivery whereas the petitioner wants to submit that the explanation may be read to mean that two different deliveries to different ladies from one man cannot make the man disqualified on exceeding number of children beyond two. The explanation nowhere deals with subject of either two deliveries of one lady or different deliveries of different ladies with one man. In view of the above, the arguments advanced by learned counsel for the petitioner that no word in the provision can be rendered ineffective or purposeless has no relevance.

The Division Bench of this court in the case of Shree Cement Ltd. (supra), after considering several earlier judgments, held that explanation appended to a section is part and parcel of section it is added to clear some ambiguity in main portion, but cannot be construed to widen the ambit of provision. The explanation under Section 19 has also been added to rule out possibility of ambiguity, which was likely to crop up because of the simple language used in the main section and proviso (iv) of Section 19. Proviso (iv) of Section 19 provides that birth during the period from the date of commencement of the Act to 27th November, 1995 of an additional child shall not be taken into consideration for the purpose of the disqualification mentioned in clause

(l) of the Section 19. Without the Explanation, the proviso (iv) of the Section 19 would make the person disqualified from contesting the election on getting more than one children even in single delivery. The ambiguity as would have been created by the proviso (iv) of Section 19 has been clarified by the explanation. This explanation neither can be read to relax the restriction imposed by sub-clause (l) of Section 19 read with proviso (iv) nor it can be read to enlarge the limit fixed by the clause (l) of the Section 19 of the Act of 1994.

This court in the case of Rajendra Kumar vs. State of Rajasthan-S.B.Civil writ petition NO.223/2004-decided on 21.12.2004 (By me), after following earlier Division Bench decision of this court, held that in case the child is given in adoption by a person to other person then that child cannot be counted in the number of children of the person who gave the child in adoption to other person. In view of the above decision, according to learned counsel for the petitioner, how many children born to a person is immaterial. What is material is that how many children one couple had at the time of consideration of his candidature for the election for the post under consideration. Therefore, this court in Praga Ram's case (supra) rightly held that use of word 'couple' in the explanation means to existing husband and wife and not the husband and his deceased or earlier or first wife. The children of existing husband and wife can be taken into account while

considering the qualification of the person to contest the election under the Act of, 1994.

The argument of learned counsel for the petitioner ignored the fact that with the death of petitioner's wife, the relationship of father and son/daughter has not come to end or severed, which happens on giving a child in adoption to other. If the argument of the learned counsel for the petitioner that number of children of existing couple only can be taken in account is accepted than it will mean that a person, who was not qualified to contest the election because of his having more than two children, with the death of his wife or on divorce to his wife that person will again become qualified candidate to contest the election. Such an interpretation of either clause (l) of Section 19 or Proviso (iv) or the Explanation to Section 19 will be against the legislative intention. Therefore, the analogy, which was applied in the case of Rajendra Kumar (supra), has no application to the facts of this case.

Learned counsel for the petitioner vehemently submitted that the law laid down by the decision of Single Bench of this court in Praga Ram's case (supra) is binding upon the single bench of this court and in case the Single Bench of this court takes a different view then the mater can be referred to larger bench only, but co-ordinate bench cannot take

contrary view. So far as above proposition is concerned, there cannot be any quarrel as it is settled law that the judgment of co-ordinate bench is binding. But the proposition advanced by learned counsel for the petitioner has no application in view of the fact that the Division Bench judgment of this court delivered in the case of Mukesh Kumar Ajmera Vs. State of Rajasthan & Ors reported in RLW 1997(2) Raj. 1061 was not brought to the notice of the court when the Praga Ram's case was decided by the learned single. The Division Bench of this court considered the validity of sub-clause (l) of Section 19 of the Act of 1994 in detail. A specific point was raised before the Division Bench in Mukesh Kumar Ajmera's case (supra) that sub-clause (l) of Section 19 infringes the privacy and right of procreation of more than two children and thus violative of Article 21 of the Constitution of India and further a specific point was raised that there is no reasonable nexus with the object sought to be achieved and the said provision is violative of Article 25 and 26 of the Constitution of India. An argument was also advanced before the Division Bench that the sub-clause (l) of Section 19 is a restrain on the inherent and natural human right of procreation of third and subsequent child and infringes the right of privacy. The Hon'ble Division Bench observed as under: -

> "These provisions have been enacted by the Legislature to control the menace of population explosion. Growing population is one of the major problem which India is

facing today. Population progresses by geometrical progress while the resources increase only at an arithmetical rate. Rertrand Bussel has sated "Population explosion is more dangerous than the hydrogen bomb." The legislative power to deal with the population matter effectively, purposely, meaningfully, objectively and efficiently stem basically from the social policy contained in the Directive Principles of the State Policy enshrined in Article 39(e),(f), 41, 43, 45 and 47 of the Constitution of India. This social policy is designed to secure social order for the promotion of welfare of the people, adequate means of livelihood, raising the level of nutrition and standard of living, improving public health etc. These objectives can be achieved if the rapidly increasing population is controlled and the rate of population growth is essentially minimised otherwise all these policies will remain in vacum. Imposing the conditions by providing the disqualification in the election of the Panchayat Raj Institution is a first step to achieve this goal. The Leaders at the grass-root level have to put an example before the electorates. The disqualification provided in Section 19(l) cannot be said to be against the basic human dignity or against the right to life and personal liberty. The right to be elected is neither a fundamental right nor a Common Law right. It is a statutory right which flows from the statute. A statutory right created under the statute is subject to the limitations provides under a particular statute. According to Section 19, every person registered as a voter of a Panchayat Raj Institution, is qualified for election as a Panch or a Member of the Panchayat Raj Institution, is qualified for election as a Panch or a Member

> of the Panchayat Raj Institution. The right to be election, thus, flows from Section 19 of the Act and, therefore, this right accrues to a person concerned is subject to the restrictions contained in Section 19 or other provisions of the Act." (emphasis supplied)

The Division Bench of this court held that "a right to privacy and liberty are not absolute right. A law imposing reasonable restrictions upon it for compelling interest of State must be held to be valid. The restriction imposed in Section 19(l) does not outrage the dignity of the individual. The object of this provision is to control population growth and family planning and such type of interference is necessary in a democratic society in the economic welfare of the country. The restrictions have been laid down with a social purpose, i.e., to fulfill the mandate given in the Directive Principles enshrined in the Constitution. If the population growth is not controlled and family planning is not observed then looking to the limited sources available with the country, it will be difficult for the State to achieve these goals".

The Supreme Court in the case of AIR India Vs. Nagesh Meerza & Ors. reported in 1981(4) SCC 335 observed as under: -

> "In the first place the provision preventing the third pregnancy with two existing children would be in the larger interest of the health of the Air Hostesses concerned as

> also for the good upbringing of the children. Secondly, as indicated above, while dealing with the rule regarding prohibition of marriage within four years, same considerations would apply to a bar of third pregnancy where two children are already there because when the entire world is facing with the problem of population explosion, it will not only desirable but absolutely essential for every country to see that the family planning programme is not only whipped up but maintained as sufficient levels so as to meet the danger of over -population which, if not controlled, may lead to serious social and economic problems through-out the world." (emphasis supplied)

The Division Bench of this court after considering the case of Nagesh Meerza & Ors (supra) observed that:-

> "Law is enacted to serve the need of the society. It has to keep pace with the aspirations and need of the society as well as to take into consideration the changing concept of the value. It is only with an intention to serve the social purpose, namely, to control the problem of population explosion that these provisions have been enacted." (emphasis supplied)

The Division Bench categorically held [by Section 19(l)] "no invasion of any constitutional right of any person. There is, also, no invasion on the part of the Legislature in marital right of any person

concerned or a right or procreation of children. It is a statutory right guaranteed under the Panchayati Raj Act to be elected but that right is with certain restrictions and if somebody wants to assert that right, he has to abide by such restrictions because this statutory right is subject to statutory restrictions contained in the Act" and, thereafter, the Division Bench laid down that "the restriction imposed in Section 19(l) neither outrage the dignity of a person nor it infringe any of the fundamental rights, Common Law right or a marital right of procreation of a child."

Not only above, the Division Bench has held that there is a reasonable nexus in framing these provisions with the object sought to be achieved the object which is sought to be achieved is to implement the family planning programme and restrict the family to check the population explosion, which is one of the major problems which India is facing today. The Division Bench found that it was a necessary major with the purpose of implement the mandate of the Directive Principles of the State Policy. Thus the sub-clause (l) of Section 19 does not violate Article 25 and 26 of the Constitution of India. A person out of marital life can produce more than two children but in that case the statutory right conferred upon a voter under the Act will not be available to him as these are the rights created under the statute and are subject to the statutory limitations.

In view of the decision of this court, the reasons given by the learned Single Judge after forming an opinion that if the restriction as imposed by sub-clause (l) of Section 19 of the Act of 1994 is made applicable to the second wife then it will violate the fundamental right of lady to have children, appears to be contrary to the reasons given by the Division Bench of this Court after considering the Section 19(l) of the Act of 1994 and provisions of the Constitution of India. So far as right of second or subsequent wife of person is concerned, it is not affected by sub-clause (l) of Section 19 because second or third or even first lady's right to contest election shall remain intact and she cannot be declared disqualification on account of increase in number of her husband's children from any other wife. Therefore, whatever, right of the ladies are concerned, they are not affected by holding that "candidate's all children to whom he/she gave birth" be counted while determining the qualification "of the candidate".

In view of the above reason even petitioner's third wife's right for the purpose of election will not be effected on her giving birth to two children from the wedlock with the petitioner despite the fact that her husband has already incurred disqualification on account of having more than two children to him. Therefore, the petitioner's wife is, if a registered voter and has two children from petitioner and petitioner has

more children from his earlier or subsequent wife/ wives then they will not make the petitioner's wife disqualified to contest the election because of simple reason that the qualification of the applicant alone can be looked into and it is irrelevant whether her husband is qualified to contest election or not. Apart from it, it is clear from the language used in Section 19 that the restriction applies to the registered voter irrespective of the application of personal law to that voter. Therefore, if petitioner by exercising his option to marry as it was permissible to him under his personal law then number of his children are relevant for determining the candidature of the petitioner in the light of Section 19 (l) read with proviso (iv) and Explanation appended to it.

It may sum up; the **(1)** right to be elected is a pure and simple statutory right and created by statute and (in present case) subject to statutory limitations from Section 19 of the Act, **(2)** right to privacy and liberty are not absolute rights, therefore, restrictions can be imposed for compelling interest of the State upon right of privacy and liberty, **(3)** the restriction imposed in Section 19(l) does not outrage the dignity of the individual nor it infringe any of the fundamental rights, Common Law right or a marital right of procreation of a child, **(4)** the restrictions have been laid down with a social purpose, i.e., to fulfill the mandate given in the Directive Principles enshrined in the Constitution, **(5)** by restriction imposed by sub-clause (l) of Section 19, no invasion in marital

right of any person concerned or a right or procreation of children, **(6)** a person out of marital life can produce more than two children but in that case the statutory right conferred upon a voter under the Act will not be available to him as these are the rights created under the statute and are subject to the statutory limitations, **(7)** the Explanation to Section 19 only deals with the case of birth of more than one children in single delivery and it has nothing to do with the case of two deliveries, **(8)** in counting number of children, total number of the *children of the candidate is* relevant irrespective of children of his/her spouse. The petitioner who gave birth to his third children after cut out date though from two wives incurred disqualification with the birth of his third children. By the death of petitioner's first wife, the petitioner's relation with his children has not severed. With the death of the petitioner's second wife also, the petitioner has not became issueless. Though the petitioner has no children from his third wife still he is father of three children at relevant time (with birth of a child after cut out date), hence is disqualified to be elected. Petitioner's wife has no disqualification due to his husband's children from other wives.

In view of the above discussion, I do not find any merit in the writ petition. Hence, the writ petition of the petitioner is dismissed.

(**PRAKASH TATIA), J.**

c.p.goyal/-